

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK E. EALEY,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

NO. 21520

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

EUGENE G. CUSHING
United States Attorney

FILED

MAY 25 1967

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WM. B. LUCK, CLERK

MAY 26 1967

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1 STATEMENT OF JURISDICTION^{1/}

2 Appellant was charged in a six-count Indictment with
3 violation of the Federal Narcotics Laws. Said Indictment
4 is set forth as follows (Ct. 1):

5 COUNT I

6 That on or about December 16, 1965, at Seattle,
7 Washington, within the Northern Division of the
8 Western District of Washington, FRANK E. EALEY did
9 knowingly and unlawfully conceal and sell a quantity
10 of narcotic drugs, to wit, approximately 30.773
11 grams of heroin hydrochloride, knowing the same to
12 have been imported into the United States contrary
13 to law.

14 All in violation of 21 U.S.C. 174.

15 COUNT II

16 That on or about January 13, 1966, at Seattle,
17 Washington, within the Northern Division of the
18 Western District of Washington, FRANK E. EALEY did
19 knowingly and unlawfully conceal and sell a quantity
20 of narcotic drugs, to wit, approximately 66.921
21 grams of heroin hydrochloride, knowing the same to
22 have been imported into the United States contrary
23 to law.

24 All in violation of 21 U.S.C. 174.

25 COUNT III

That on or about December 16, 1965, at Seattle,
Washington, within the Northern Division of the
Western District of Washington, FRANK E. EALEY did
knowingly and unlawfully sell, disperse and distri-
bute a quantity of narcotic drugs, to wit, approxi-
mately 30.773 grams of heroin hydrochloride, not in

^{1/} In this brief (Ct.) will refer to the number of the
records herein given by the Clerk of the Court for the Western
District of Washington. (Tr.) will refer to the Court
Reporter's transcript of proceedings. (Ex.) will refer to
exhibits.

1 or from the original stamped package.

2 All in violation of Title 26, U.S.C.,
3 Section 4704(a).

4 COUNT IV

5 That on or about January 13, 1966, at Seattle,
6 Washington, within the Northern Division of the
7 Western District of Washington, FRANK E. EALEY did
8 knowingly and unlawfully sell, disperse and distri-
9 bute a quantity of narcotic drugs, to wit, approxi-
0 mately 66.921 grams of heroin hydrochloride, not
1 in or from the original stamped package.

2 All in violation of Title 26 U.S.C.,
3 Section 4704(a).

4 COUNT V

5 That on or about December 16, 1965, at Seattle,
6 Washington, within the Northern Division of the
7 Western District of Washington, FRANK E. EALEY did
8 knowingly and unlawfully sell a quantity of narcotic
9 drugs, to wit, approximately 30.773 grams of heroin
0 hydrochloride, not in pursuance of a written order
1 of the person to whom such heroin hydrochloride was
2 sold on a form issued in blank for that purpose by
3 the Secretary of the Treasury or his delegate.

4 All in violation of Title 26, U.S.C.,
5 Section 4705(a).

6 COUNT VI

7 That on or about January 13, 1966, at Seattle,
8 Washington, within the Northern Division of the
9 Western District of Washington, FRANK E. EALEY did
0 knowingly and unlawfully sell a quantity of narcotic
1 drugs, to wit, 66.921 grams of heroin hydrochloride,
2 not in pursuance to a written order of the person
3 to whom such heroin hydrochloride was sold on a form
4 issued in blank for that purpose by the Secretary of
5 the Treasury or his delegate.

6 All in violation of Title 26, U.S.C.,
7 Section 4705(a).

1 Defendant entered a plea of not guilty as to each
2 count on August 17, 1966, and was tried by a jury on
3 September 6, 1966. A verdict of guilty was returned by the
4 jury on each count of the Indictment on September 6, 1966,
5 and on October 28, 1966, the Judgment and Sentence was pro-
6 nounced and imposed on Counts I, II, V and VI (Ct. 10).
7 The defendant was acquitted on Counts III and IV of the
8 Indictment on a finding of not guilty by the Court.

9 Jurisdiction of the District Court was based on Title 18,
10 U.S.C., Section 3231. This Court has jurisdiction of the
11 appeal under Title 28 U.S.C., Section 1291.
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1 COUNTERSTATEMENT OF THE CASE

2 The testimony taken at the trial established the
3 following: The Seattle office of the Federal Bureau of
4 Narcotics suspected Frank Ealey of engaging in narcotic sales
5 in the Seattle area and commenced an investigation of his
6 activities in October of 1965 (Tr. 6,7). Joseph Gordon, a
7 King County Deputy Sheriff, was loaned to the Federal Bureau
8 of Narcotics as an undercover agent (Tr. 30) and met the
9 defendant Frank Ealey on December 7, 1965 (Tr. 31). Arrange-
10 ments were made at that time for Gordon to purchase narcotics
11 from Ealey in the future (Tr. 32). On December 16, 1965,
12 Deputy Sheriff Gordon was furnished with \$500.00 of official
13 Government advance funds (Tr. 34) and met with defendant Ealey
14 at the Lin-Villa Motel in Seattle (Tr. 36) where Gordon paid
15 Ealey \$350.00 for narcotics (Tr. 39). Ealey pointed to a
16 paper sack located in a tree just outside the door of his
17 unit at the Lin-Villa Motel and Deputy Gordon retrieved the
18 paper sack which contained a white substance (Tr. 39) which
19 later proved to be 30.7 grams of heroin hydrochloride
20 (Tr. 96-97). On January 13, 1966, Narcotics Agent Joseph
21 Ferro furnished Deputy Gordon with \$1,100.00 of official Govern-
22 ment advance funds with which to purchase narcotics from defen-
23 dant Frank Ealey (Tr. 47-48). Deputy Gordon, on that date,
24 met Ealey at an apartment house located at 2801 Yesler Way
25 where Ealey sold to Gordon a rubber container with white

1 powder therein for \$1,050.00 (Tr. 51). The white powder
2 contained inside said container proved to be 66.9 grams of
3 heroin hydrochloride (Tr. 98-99).

4 The testimony of Deputy Gordon was corroborated by
5 Agent Joseph Ferro (Tr. 5-27) and by Narcotics Agent Aubrey
6 Abbey (Tr. 74-93). Deputy Gordon further testified that he
7 was not registered with anyone to purchase narcotics except
8 in the course of his official duties (Tr. 57 and 58).

9 At the close of the Government's case, defense counsel
10 moved for a mistrial and for a judgment of acquittal on all
11 six counts (Tr. 104-108). The Court denied the motion for
12 a mistrial and denied the motion for a judgment of acquittal
13 as to Counts I, II, V and VI, while reserving ruling on the
14 motion for judgment of acquittal on Counts III and IV (Tr. 108).
15 The defendant then took the witness stand. When the defense
16 rested (Tr. 121) the defense failed to renew its motion for
17 a judgment of acquittal on all counts (Tr. 121-124). After
18 the Court had instructed the jury and had allowed the jury
19 to retire to the jury room, the defense then renewed its
20 motion for judgment of acquittal as to Counts III and IV only
21 (Tr. 143).

22 QUESTIONS PRESENTED

23 1. Counts III and IV

24 (a) Whether defense requested its motion for a
25 judgment of acquittal in a timely manner.

1 (b) Whether a Trial Court has the authority to
2 reserve ruling on a motion for acquittal and submit the issue
3 to the jury.

4 2. Whether the Trial Court committed prejudicial error
5 by submitting Counts V and VI to the jury.

6 3. Whether the defendant's acquittal on Counts III and
7 IV forecloses conviction on Counts I and II.

8 4. Whether there were any grounds for a mistrial.

9 SUMMARY OF ARGUMENT

10 1. (a). Defendant did not make a motion for judgment of
11 acquittal at the close of all testimony; hence, the sufficien-
12 cy of the evidence on Counts III and IV is not subject to
13 review at this time.

14 (b). A Trial Court has the authority to reserve its
15 ruling on a motion for acquittal if the motion is made at the
16 close of all the evidence and to submit the issue to the jury.

17 2. The sufficiency of the evidence on Counts V and VI
18 is not subject to review at this time because no motion for
19 acquittal was made at the close of all the evidence.

20 3. The evidence is sufficient to warrant conviction on
21 Counts I and II.

22 4. No grounds for mistrial were cited in appellant's
23 brief.
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2 ARGUMENT

3 I

4 A TRIAL COURT HAS THE DISCRETION TO RESERVE RULING
5 ON A MOTION FOR ACQUITTAL AND SUBMIT THE ISSUE TO
6 THE JURY

7 The record reveals that the trial court instructed the
8 jury as to the law on each of the six counts contained in the
9 Indictment, (TR 125-143) after which the jury returned a
10 verdict of guilty on all six counts. Thereafter, at the
11 time of sentencing, the trial court reversed the jury verdict
12 as to Counts III and IV and entered a judgment of acquittal on
13 said counts. Appellant charges that the trial court followed
14 incorrect procedure and does not, within its discretion, have
15 the right to reserve its ruling on counts such as III and IV.

16 Rule 29 of the Federal Rules of Criminal Procedure
17 specifically authorizes the Court to reserve decision when a
18 motion for judgment of acquittal has been made:

19 (b) Reservation of decision on motion. If a
20 motion for judgment of acquittal is made
21 at the close of all the evidence, the court
22 may reserve decision on the motion, submit
the case to the jury and decide the motion
either before the jury returns the verdict
or after it returns a verdict of guilty or
is discharged without having returned a verdict...
[emphasis supplied]

23 This provision has been upheld in Jackson v. United States,
24 250 F.2d 897 (5th Cir. 1958) at page 901:
25

1
2 The court may reserve a ruling on a motion for
3 acquittal made at the close of all the evidence
and submit the case to a jury.

4 See also Cooper v. United States, 321 F.2d 274 (5th Cir. 1963),
5 and Weathers v. United States, 322 F.2d 566 (9th Cir. 1963).
6 And United States v. Gasomiser Corp., 7 F.R.D. 712 (1948),
7 states as follows at page 718:

8 This case clearly shows the value of the pro-
9 cedure preserved by Rule 29(b) of the Rules of
Criminal Procedure. Under such a rule the court
10 may allow a jury to pass upon the facts with
possible affirmative verdict of not guilty for
11 a defendant and at the same time, after proper
reservation, maintain its jurisdiction to direct
12 in a proper case an acquittal as a matter of law.

13 It should be noted, however, that appellant did not make a
14 motion for a judgment of acquittal on Counts III and IV "at
15 the close of all the evidence" and prior to jury instructions,
16 as required by Rule 29(b). The motion was made at the close
17 of the Government's case (TR 105) and was not renewed until
18 after the jury had been instructed and retired to deliberate.
19 (TR 143) The law setting forth the time when such motions
20 must be filed will be cited in Argument II of this brief, *infra*.

21 Appellant cites two cases in support of its position,
22 Chichos v. Divideria, 87 S.Ct. 271 (1966) and United States ex
23 rel Hetenyi v. Wilkens, 384 F.2d 844 (2nd Cir. 1965), cert. den.
24 Mancusi v. Hetenyi, 383 U.S. 913. Government counsel cannot
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1
2 locate a 1966 Supreme Court decision entitled Chichos v.
3 Divideria; however, perhaps appellant's counsel is referring
4 to the case of Cichos v. Indiana, decided by the Supreme Court
5 in October, 1966. If this is the case, neither the Cichos
6 case nor the Hetenyi case are in point because both deal with
7 the issue of double jeopardy, which is not a problem in this
8 case.

9 Appellant further contends there was not any evidence
10 presented indicating that the defendant knowingly sold a
11 quantity of narcotics "not in or from the original package"
12 and therefore, the issue should not have gone to the jury.
13 Appellant cites Epstein v. United States, 174 F.2d 754 (6th
14 Cir. 1949), which case is not in point. The narcotic drugs
15 themselves, Government's Exhibits 1 and 2, were admitted into
16 evidence (TR 97 and 99) and were available to the jury for
17 examination during their deliberation. Surely the jury could
18 examine in the jury room the drugs and the propholactic in
19 which they were contained, and note that no revenue stamp was
20 affixed thereto. Title 26, United States Code, Section 4704(a)
21 provides in part as follows:

22 ...the absence of appropriate tax paid stamps
23 from narcotic drugs shall be prima facie evidence
24 of a violation of this subsection by the person
25 in whose possession the same may be found.

1
2 The court instructed the jury as to this statutory provision
3 in the following language:
4

5 With regard to Counts III and IV, the absence
6 of appropriate tax paid stamps from the heroin
7 hydrochloride is prima facie evidence of a
8 violation of the applicable law by the person in
9 whose possession they may be found. (TR 133)

10 Hence, there was more than a scintilla of evidence presented
11 and the court could properly allow issues III and IV to go to
12 the jury.
13

14 In summary, a trial judge has the discretion to reserve
15 ruling on a motion for acquittal, and to submit the issue to
16 the jury. By so doing, the defendant in this case was not
17 prejudiced by the court's procedure, especially when the
18 record herein shows that the defendant was ultimately acquitted
19 on Counts III and IV of the Indictment.
20

21 II

22 THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY
23 SUBMITTING COUNTS V AND VI TO THE JURY

24 Appellant attacks the sufficiency of the evidence
25 regarding Counts V and VI of the Indictment and alleges that
said counts should not have been submitted to the jury. The
Government contends that appellant did not move for a judgment
of acquittal on Counts V and VI at the time required by law.
Page 104 and 105 of the transcript reveal that appellant

1 moved for a judgment of acquittal on all counts of the
2 Indictment at the close of the Government's case. At page 108
3 the court denied appellant's motion for a mistrial and also
4 denied motion for judgment of acquittal on Counts I, II, V
5 and VI. The appellant, Frank Ealey, then took the stand and
6 after he had testified, the defense rested. (TR 121) No
7 motions for judgment of acquittal as to Counts V or VI were
8 made at the conclusion of the evidence, or at any time there-
9 after (TR 121-124). Hence, the appellant is unable to question
10 the sufficiency of the evidence as to Counts V and VI on this
11 appeal.

12 It is well stated in Picciurro v. United States, 250
13 F.2d 585 (8th Cir. 1958) at page 589:

14 In order to entitle a defendant to question
15 the sufficiency of the evidence he must first
16 have presented the question to the trial court
17 by motion for judgment of acquittal interposed
18 at close of all the testimony, thus raising
19 a question of law which this court will
20 consider on appeal, and it is well settled
21 that absent such motion this court will not
22 review the evidence. 7th Amendment, U.S.
23 Constitution; (Cases cited). [emphasis added]

24 The Picciurro case is identical to the one in question in
25 that defense counsel at the close of the Government's
evidence moved for judgment of acquittal which motion was

1
2 denied. The defendant failed to renew his motion at the
3 close of all evidence, and the court therefore refused to
4 review the evidence on appeal. See also Rosenbloom v.
5 United States, 259 F.2d 500 (8th Cir. 1958); Costner v.
6 United States, (6th Cir. 1959). The rationale is stated in
7 Corbin v. United States, 253 F.2d 646 (10th Cir. 1958)
8 at page 647:

9
10 At the conclusion of the Government's case,
11 Corbin demurred to the evidence and moved for
12 a directed verdict. After adverse ruling by
13 the court thereon, he presented evidence in
14 defense of the charges. By this action he
15 waived any objection he may have had to
such rulings. At the conclusion of their
presentation of evidence, Corbin made no
motion for a judgment of acquittal or any
other motion attacking the sufficiency of the
evidence. [emphasis supplied]

16 Hence, the general rule is that a Federal appellate court
17 will not pass upon the sufficiency of the evidence to
18 support a verdict in the absence of a motion for a
19 judgment of acquittal interposed at the close of all
20 testimony.
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1 In summary, since appellant failed to move for a
2 judgment of acquittal on Counts V and VI at the close of all
3 testimony, the sufficiency of the evidence on said counts
4 is not subject to review at this time. This argument also
5 applies to Counts III and IV, discussed supra in Argument I
6 inasmuch as appellant did not move for a judgment of acquit-
7 tal on those counts at the close of the testimony.

8
9 III

10 DEFENDANT'S ACQUITTAL ON COUNTS III AND IV
DOES NOT FORECLOSE CONVICTION ON COUNTS I AND II

11 Appellant contends that acquittal on Counts III and IV
12 prevent a conviction on Counts I and II because 21 U.S.C.,
13 174 and 26 U.S.C., 4704(a) each require the knowing sale of
14 a quantity of contraband. The Government contends that such
15 an allegation presents a frivolous defense.

16 Both 21 U.S.C. 174 and 26 U.S.C. 4704(a) require as an
17 element of proof testimony showing the sale of a narcotic
18 drug. The evidence in this case proving sale is overwhelming,
19 consisting of direct testimony from the King County Deputy
20 Sheriff, Joseph Gordon, that he actually purchased heroin
21 hydrochloride from the defendant Ealey on December 16, 1965
22 and January 13, 1966. His testimony is corroborated by that
23 of Narcotic Agent Joseph Ferro and Narcotic Agent Aubrey
24 Abby. The second element of proof necessary to sustain a
25

1 conviction under 21 U.S.C. Section 174 is that the defendant
2 knew the narcotic drug was imported or brought into the United
3 States contrary to law. Since it is often difficult to trace
4 the course of travel of a quantity of narcotic drugs, 21 U.S.C.
5 174 contains a presumption that unexplained possession of a
6 narcotic drug is deemed sufficient evidence to authorize
7 conviction unless the defendant explains the possession to
8 the satisfaction of the jury. The testimony of King County
9 Deputy Sheriff, Joseph Gordon, amply shows that the defendant
10 did in fact have possession of the narcotic drug on the dates
11 charged in the Indictment, and the defendant did not explain
12 said possession. This presumption has held valid by the
13 Court of Appeals for the Ninth Circuit in Brown v. United
14 States, (9th Cir., decided Dec. 30, 1966). Hence, the evi-
15 dence is ample to support the defendant's conviction under
16 Counts I and II, and the defendant's allegation is without
17 merit in fact and without support in law.

18 IV

19 THERE WERE NOT ANY GROUNDS FOR A MISTRIAL

20 Appellant charges that the transcript is replete with
21 mis-statements, conclusions and characterizations by witnesses
22 for the Government regarding defendant's activities, and that
23 a motion for mistrial should have been granted. However,
24 the only specific example cited in defendant's brief refers
25 to Page 35 of the transcript, where King County Deputy

1 Sheriff Gordon, the undercover agent, testified that his
2 cover story when first meeting Ealey was that he was
3 inexperienced and had received complaints about previous
4 narcotics. It is impossible to visualized how this testi-
5 money would have harmed the appellant's defense, especially
6 in view of the fact that the Court instructed the jury to
7 disregard the statement referring to previous narcotics
8 (TR 35-36). As stated in Glasser v. United States, 315 U.S.
9 60, 83

10 We must guard against the magnification
11 on appeal of instances which were of little
12 importance in their setting.

13 CONCLUSION

14 For the reasons set forth above, the Government
15 respectfully urges that the conviction by the trial court
16 as to Counts I, II, V and VI of the Indictment be sustained.

17 Respectfully submitted,

18
19 EUGENE G. CUSHING
United States Attorney

20
21 MICHAEL J. SWOFFORD
22 Assistant United States Attorney
23
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25

1 I certify that, in connection with the preparation of
2 this brief, I have examined Rules 18 and 19 of the United
3 States Court of Appeals for the Ninth Circuit, and that, in
4 my opinion, the foregoing brief is in full compliance with
5 these rules.
6
7

8 MICHAEL J. SWOFFORD
9 Assistant United States Attorney
10
11

12 I hereby certify that a copy of the aforesaid Brief for
13 Appellee was mailed this date to:

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21 DATED at Seattle, Washington this _____ day of May,
22 1967.
23
24
25

26 MICHAEL J. SWOFFORD
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